No. 9220

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, acting for and in behalf of the Farm Credit Administration,

Appellant,

vs.

J. A. BURLEIGH,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

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Upon Appeal from the District Court of the United States for the District of Oregon.

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This is an appeal from a judgment of the United States District Court for the District of Oregon, dismissing the complaint of the United States in an action against J. A. Burleigh to recover on a promissory note for $1,000.00 and interest at the rate of 5½ per cent per annum executed by J. A. Burleigh

on June 5, 1932, in renewal of a prior note in the same amount dated April 15, 1931, given by said Burleigh to the United States (Secretary of Agriculture) for funds with which to purchase stock in a privately owned agricultural credit corporation from which the defendant Burleigh was a borrower.

JURISDICTIONAL STATEMENT

The pleadings in this case as disclosed by the record are a complaint (R. 2-5) in which there is stated an action on a note for $1,000.00 executed by the defendant to the Secretary of Agriculture payable one year from June 5, 1932, with interest at the rate of 5½% per annum. The complaint recites the pledge of ten shares of the capital stock of the Agricultural & Livestock Credit Corporation, an Oregon corporation, of the par value of $100.00 per share, and a stipulation in the note with respect to the sale of the collateral in the event of default. The complaint recites the failure to pay the note on demand after maturity, that the Farm Credit Administration has succeeded to the interests of the Secretary of Agriculture in respect to the note, and that it is now the owner and holder of the note and the collateral deposited to insure payment of the obligation. The complaint avers that the jurisdiction of the Court is founded upon the fact that the United States of America is the party plaintiff (Tr. p. 2).

The second amended answer of the defendant (R. 26-50) admits the material allegations of the complaint but avers that as a result of fraud practiced upon the defendant by the officers and agents of the Agricultural & Livestock Credit Corporation (a privately owned agricultural credit corporation organized under the laws of the State of Oregon (R. 269-276, 334)) and by representatives and agents of the Secretary of Agriculture the defendant was induced to apply for the loan evidenced by said note for the purpose of purchasing stock represented to be worth par, which defendant alleges was in fact at that time wholly worthless and known to be worthless by the officers and agents of the Corporation and the agents and representatives of the Secretary of Agriculture; and in effect the defendant avers that the officers of said Corporation and the Secretary of Agriculture conspired to defraud the plaintiff by selling him worthless stock in said Corporation. Defendant avers that he received no consideration for the execution of said note in suit and prays for dismissal of the complaint.

The plaintiff filed a reply denying the new and material allegations contained in the answer and alleged that, since the promissory note in suit was a renewal note taken in the full amount of the certain promissory note made and executed on June 5, 1931, pursuant to the Act of Congress referred to

in the complaint [Public 666, 71st Congress] and defendant knew or had reasonable ground to discover many of the alleged facts set forth as an affirmative defense in the action, he was estopped to set up such defenses. The United States District Court had jurisdiction under the provisions of Section 41 Subsection (1) of Title 28 of the United States Code. This Court has jurisdiction to entertain this appeal under the provisions of Section 225(a) First of Title 28 of the United States Code. The jurisdiction in the United States District Court is shown by the complaint (R. 2-5).

The principal question involved in this case is:

Was there consideration to support the note in suit?*

The foregoing question is raised throughout the record as follows: By plaintiff's motion for judgment (R. 21-22); by plaintiff's second motion for judgment (R. 57); by plaintiff's motion for judgment on the pleadings made upon the trial (R. 122), and by the objection of counsel on the trial to the in-

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*Although there are various allegations of fraud and misrepresentation throughout the defendant's pleadings and testimony, all of such allegations and testimony are presented to support the principal contention of the defendant that there was a lack of consideration for the obligation. For that reason, questions relating to any fraud or misrepresentation will be discussed in connection with the question of consideration.

troduction of any evidence on behalf of the defendant "for the reason that the answer fails to state any cause of defense" (R. 162).

The plaintiff's assignments of errors appear at pages 414-416 of the record and are more particularly developed in the argument.

STATEMENT OF FACTS

The note in suit was given in consideration of a loan made to the defendant Burleigh by the Secretary of Agriculture for and on behalf of the United States of America. The loan was made under the provisions of an act of Congress known and designated as Public No. 666, 71st Congress (United States Statutes at Large, Volume 46, Page 1160) approved February 14, 1931.

As indicated by its terms, the said Act of Congress authorized the Secretary of Agriculture to make loans to individual borrowers for the purpose, among other things, of increasing the capital stock of agricultural credit corporations. The Secretary was authorized to take security for such loans to be provided for under such rules and regulations as he might prescribe. On February 26, 1931, the Secretary promulgated instructions under Public No. 666, the material portions of which are incorporated in the record (R. 366-373), Under these regulations the

Secretary, in prescribing the procedure to be followed, required that the stock certificates in the agricultural credit corporation or livestock loan company assigned in blank by the borrower must be delivered to him, together with such additional security as the Secretary might require (R. 370). In all cases the Secretary requires a sworn statement of the financial condition of the borrower (R. 370). Under the regulations it was provided that in all cases he might require security in addition to the stock of the corporation (R. 371).

It is further provided in said regulations that if at any time the Secretary found that there was an impairment of the security, additional collateral would be required, and upon failure to furnish the same within ten days the entire indebtedness should become immediately due and payable.

The defendant, in answering the complaint, set up a separate defense containing averments to the effect that the stock of the Agricultural & Livestock Credit Corporation was worthless at the time the Secretary made the loan to the defendant; that it was known to the Secretary to be worthless (R. 28, 29); that the sole purpose in making said loan to the defendant was to strengthen the collateral of the Agricultural & Livestock Credit Corporation with respect to certain paper which it had taken from borrowers and which had been discounted for

it. This paper was in fact discounted by the Federal Intermediate Credit Bank of Spokane (R. 200) but in defendant's pleadings he does not distinguish between the United States Government as represented in this transaction by the Secretary of Agriculture, and the Federal Intermediate Credit Bank, a corporation organized under the provisions of the Federal Farm Loan Act as amended (12 U.S.C. 1021, et seq.) for the purpose of assisting in financing American agriculture (R. 28, 43).

Defendant further alleged various representations made to him by the officers of the Agricultural & Livestock Credit Corporation under which he avers that such officers represented to him that the Corporation would pay the interest on the note he would execute to the Secretary of Agriculture; that they further represented that the stock would be worth on liquidation an amount sufficient to pay the principal of said note, and that in fact he would not be called upon to pay any amounts on account of said note (R. 31).

The defendant further alleged in the separate defense that the plaintiff, the United States of America, through various intermediaries not mentioned or specifically identified, and the identity of which was averred to be unknown to the defendant, evolved the plan to sell the stock of the Agricultural & Livestock Credit Corporation to various persons upon

the representation that the Corporation was solvent and that the capital stock sold was stock in a solvent corporation, having the full value of the selling price, (par) (R. 32).

The defendant alleged that the stock was wholly worthless and that the sale to him was in fact the result of various schemes which, although not alleged to be such, in fact amounted to allegations of a conspiracy between the Secretary of Agriculture and officers of the Corporation and the officers of the Federal Intermediate Credit Bank, although the last named institution was not specifically designated in the second amended answer (R. 26-50). As heretofore stated, the trial court (a jury having been waived by stipulation of the parties) after hearing oral evidence and after receiving documentary evidence, rendered judgment in favor of the defendant and dismissed the complaint. From the judgment so rendered the plaintiff has appealed to this Court and has indicated in its statement of points to be relied on the various errors which it deems to have been committed by the lower court (R. 414).

However, since specifications of error numbered 5 to 11 relate to errors assigned with respect to findings of fact by the court not sustained by the evidence, and the findings of the court are extremely voluminous, the plaintiff will state the single ques-

tion to which the issues in this case may be reduced, namely: *The court erred because it held that there was no consideration paid for the note.** The finding with respect to this question is set out in the first paragraph of Finding XIII under the court's Findings of Fact. (See Assignment of Error 10, R. 415.)

We are therefore confronted with a few primary questions in this appeal — namely: (1) Was there consideration for the promissory note which is the basis of appellant's action? (2) Was there any material evidence to support the findings of the trial court in favor of the appellee? (3) Was not the appellant entitled to judgment on the pleadings? (4) Were the defenses urged available to the appellee when the action was based upon a renewal note? (5) If there were evidence of fraud by agents of the United States, would the Government be bound thereby?

SPECIFICATIONS OF ERROR

I.

The Honorable Trial Court erred in denying appellant's motion for judgment on the pleadings (R. 56).

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*See comments, footnote page four, supra.

II.

The Honorable Trial Court erred in denying appellant's requested findings of fact and conclusions of law (R. 65).

III.

The Honorable Trial Court erred in finding that there was no consideration paid by appellant for the promissory note which is the basis of this action; this is incorporated in Finding of Fact No. 13 (R. 109) and covered by Specifications of Error Nos. 5 to 11 (R. 414).

ARGUMENT

Specification I.

THE HONORABLE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS.

Appellant's motion for judgment was based upon the plain facts admitted in appellee's pleadings to the effect that, in spite of other voluminous allegations inferring fraud but not sufficiently pleading fraud, as the result of appellee's desire to benefit a private corporation (R. 41) and relying upon certain representations made by that corporation (R. 42), he executed and delivered the promissory note which is the basis of this action and received therefor not only some Class "A" Preferred Stock of said

corporation (R. 43), but the corporation received a benefit and its capital stock was increased. In fact, contrary to his allegations of fraud, the appellee further admits in his pleadings that he believes said corporation, due to good management and improved price on livestock, now has certain available assets sufficient above its liabilities to make good its agreement with him (R. 44).

These few admissions — though there are many others in the pleadings — we think entitle the appellant to a motion for judgment on the pleadings because they were admissions on the part of the appellee that he received a benefit from the admitted execution and delivery of the promissory note and that also a third party, the private corporation, received a benefit, either of which was sufficient consideration (*Fleming vs. Gamble*, 37 F. (2d) 72), and all of them nullify any other contention made by appellee in his pleadings and are binding upon him as admissions against his interest.

Specification II.

THE HONORABLE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

We submit that the Court erred in denying appellant's requested findings of fact and conclusions

of law because they were supported by the pleadings alone, if necessary, and further because they were admitted by the appellee in his testimony (R. 194, 195).

Specification III.

THE HONORABLE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO CONSIDERATION PAID BY APPELLANT FOR THE PROMISSORY NOTE WHICH IS THE BASIS OF THIS ACTION.

The basic error committed by the court is contained in the first paragraph of Finding of Fact numbered XIII as follows:

> "The court further finds that neither plaintiff, nor anyone on its behalf, either paid or gave any consideration of any kind for the original note of this defendant, nor for the renewal note upon which this proceeding is based, and that defendant nor anyone else received any benefit or consideration on account of his signing the said note."

The disposition of this case on appeal is dependent wholly on this Court's view of this finding: it is submitted that it is patently erroneous. All other errors contribute to this one basic final error. Was there consideration to support the note in suit? It is conceded that the note in suit is a renewal note. Therefore, if there was consideration to support the

original note, there was consideration to support the renewal.

The Court appears to have attached great importance to the procedure under which the proceeds of the loan were delivered to the person designated in the borrower's formal power of attorney rather than to the borrower personally, from which, and from his finding that the stock was "practically worthless" (R. 73, 107), the Court concluded that the borrower received no consideration for the notes which he executed (R. 109, Finding XIII).

The plaintiff accordingly deems it appropriate to discuss briefly the manner in which this transaction was consummated. In order that the function of the Secretary of Agriculture in connection with the making of this loan may be fully understood, the following excerpt from Public No. 666, 71st Congress, is quoted:

> "* * * there is hereby appropriated to be immediately available, out of any money in the Treasury not otherwise appropriated, the sum of $20,000,000 to be used by the Secretary of Agriculture for the following purposes: (1) to make advances or loans to individuals in the drought and/or storm or hail stricken areas of the United States for the purpose of assisting in forming local agricultural-credit corporations, livestock loan companies, or like organizations, or of increasing the capital stock of such

> corporations, companies, or organizations qualified to do business with Federal intermediate credit banks, or to which such privileges may be extended, and/or of making loans to individuals upon the security of the capital stock of such corporations, companies, or organizations, * *. The advances and loans made pursuant to this Act and amendment thereto shall be secured by liens on crops or by other security, under such rules and regulations as the Secretary of Agriculture may prescribe."

Pursuant to the law the Secretary issued rules and regulations governing the procedure, excerpts from which appear in the record (R. 345, et seq.).

By plaintiff's Exhibit 2 (R. 127-129), it will be noted that the borrower in his application stated that if the loan were granted he would sign and deliver to the Secretary or his representative a note in the amount of the loan, also he would assign the certificate or certificates of stock of the Agricultural & Livestock Credit Corporation to be held as collateral for the loan, as well as such other instruments as might be necessary to carry out the loan or in the form to be subscribed by the Secretary of Agriculture. The application and accompanying loan papers clearly provided that the proceeds of the loan were not to be personally disbursed to the borrower, but were to be sent to the borrower's attorney in fact, to be invested in the shares of stock of the Agricultural Credit Corporation and the Cer-

tificates received upon the purchase of such stock was to be assigned as collateral to the loan in accordance with the provisions of Public Resolution No. 666 (R. 129, et seq.). Furthermore, both in his original note (R. 165) and his renewal note (R. 124) there is recited that with the note there have been delivered to the Secretary, the payee named therein, "a certificate for 10 shares of the capital stock of Agricultural & Livestock Credit Corporation *as collateral security for the payment of the above note.*" (Emphasis added.)

It is perfectly apparent, and it is conceded that the proceeds of the note were used, as the borrower intended, to purchase the shares of the Corporation's stock. The purchase money, of course, became part of the capital of the Corporation in which the borrower had thereby become a stockholder and to which he was at that time indebted, as shown by the financial statement which the borrower gave the Government at the time he applied for the loan (R. 152). It is immaterial what disposition the Corporation made of the proceeds of the stock so long as they were used for a legitimate corporate purpose. The record shows that the proceeds were so used in this case (R. 297-298). The proceeds of the subscription became a part of the assets of the Corporation.

There is nothing peculiar about this transaction and the pledge of the stock was on no different footting than any transaction of a similar nature where collateral is taken to secure a note. It is quite apparent that the parties contemplated that if and when the note was paid the stock certificate would be turned over to the borrower as in any normal transaction of the same nature. It would be naive to say that because the maker of the note did not get cash paid into his hands; did not go to the Corporation and purchase the shares which he had decided to acquire; and did not put the certificate in his safe deposit box, that he got nothing for the note. He authorized all the steps in the transaction by the documents he signed (R. 332) and the result was the same except that the stock was delivered to the Secretary of Agriculture to be held as collateral security for the loan.

If the borrower had not been familiar with transactions with respect to negotiable paper, or collateral notes, and not familiar with legal and business usages in connection with transactions of this nature, it might be understood why he would contend that he did not receive value because he did not actually obtain cash upon the execution of the note, or the shares of stock were not delivered to him personally; but the borrower was a lawyer of considerable local reputation (R. 192). There can be no com-

plaint, therefore, that the borrower was an uninformed person and that advantage was taken of his ignorance by officials of the Government who were bent upon engaging in a conspiracy to obtain a note from him without consideration. In this connection, it should be noted that *neither in the opinion of the trial court nor in its findings is there any suggestion of either fraud or misrepresentation on the part of the United States of America, the holder of the note and the plaintiff in this case, or of any of its duly authorized representatives.* In fact, in the memorandum opinion (R. 72) the Court specifically states:

> "No criticism is here intended of the motives of the Government officials involved. They were merely carrying out the declared policy of Congress at the time" (R. 72).

The policy of the Congress was, of course, to loan government funds to those qualified persons desiring to borrow for the purposes stated in the act.

We have now traced the proceeds of the note into the borrower's hands. In the ordinary transaction that would suffice to refute the contention that there was no consideration to sustain the note. Why does it not have the same result here? Because the Government knew what was to be done with the proceeds? Clearly not. The borrower contends that it is because the value of the stock was misrepresented to him to be equal to par, whereas he alleges that

it was in fact worthless. There is no evidence to support this assertion as we shall show (though the court has found it to be a fact). (Finding IX, R. 106.) However, regardless of the value of the stock, it was the borrower's voluntary decision to purchase it and the record does not show that the plaintiff or its agents used coercion or misrepresentation on the borrower to influence his decision.

In response to a letter addressed to the defendant by the Agricultural & Livestock Credit Corporation, the defendant determined to invest in ten shares of the Corporation's Class "A" preferred stock and to apply to the Secretary of Agriculture for a loan of $1,000.00 to enable him to pay for such stock in full. Obviously, there was no coercion and the application for the loan and the notes were signed voluntarily. The record does not show otherwise. But the defendant alleges that he did not know of the condition of the Corporation "*and had no means of knowing*" and the court made a finding to this effect. (Finding of Fact VIII, R. 105.) There is not one iota of evidence in this record to show that the defendant did not have the means of knowing whether or not the stock which he had determined to purchase was of value or how much it was worth: his unsupported statement stands alone (R. 178).

In seeking to avoid the consequences resulting from what he now regards as an error of judgment,

the defendant has complained in his pleading that he has been defrauded because he was persuaded by the officers of the Agricultural & Livestock Credit Corporation, who he alleges were working with the support of the United States through the Secretary of Agriculture and his authorized representatives, to sell him stock that was wholly worthless and known to be worthless.

It is an untenable proposition upon the part of the defendant to assert that the Secretary of Agriculture, acting pursuant to the provisions and directions of a valid act of Congress, should be held to have participated in a fraud upon the defendant because of the fact that the Secretary of Agriculture made a loan to enable the defendant to purchase stock in an agricultural credit corporation, as the Secretary of Agriculture was authorized to do under the enactment of Congress designated Public 666, 71st Congress.

It is averred that since the loan was made for the purpose of purchasing stock and since the Secretary accepted the stock as collateral security for the loan on the basis of its full par value, it amounted to a representation by him that the stock was in fact worth that amount. We submit that no such inference is justified. The Act authorized the Secretary to make the loans and take the borrower's note and the stock as collateral. The Secretary clearly

considered both the personal responsibility of the applicant and the pledge of the stock in making the loan. Otherwise, he would not have required a financial statement of the borrower (R. 147-153).

The defendant contends further that since the Federal Intermediate Credit Bank of Spokane (a corporation organized under the provisions of Title II of the Federal Farm Loan Act as amended), which had discounted certain notes for the Agricultural & Livestock Credit Corporation, had shortly after the consummation of the loan and at various other times (more or less remotely connected in point of time with the date of the loan from the Secretary of Agriculture to the defendant Burleigh) sent to the Livestock Corporation letters of comment showing that certain assets should be written down or charged off, the Secretary must have been aware that the stock purchased with the proceeds of this loan was worthless. The defendant's proposition is entirely untenable. The fact that the Federal Intermediate Credit Bank might believe certain loans should be written down or charged off on the books of the Corporation is not proof that the stock of the Corporation had no value. As a matter of fact, one of these letters written by the Federal Intermediate Credit Bank on May 11, 1931 (only about five weeks after the borrower had applied for the loan on March 30, 1931) shows that in the opinion of the Federal Intermediate Credit Bank the

Corporation had substantial worth after making book adjustments to exclude entirely *undesirable* loans as well as those classed as "non-liquid in character and of doubtful value" (R. 209-210). However, even if the stock had been worthless, this would not give rise to a defense which could be invoked by the applicant under the facts of this case.

Aside from the fact that there is no evidence in this case to show that the Secretary of Agriculture or his agents acted improperly in making this loan to the defendant Burleigh (R. 72), there is a presumption that the Secretary, a public official of the United States Government, when he made a loan under the provisions of Public 666, supra, acted in all respects legally. (Lamport Mfg. Supply Co. v. United States, 65 Ct. Cl. 579, 610, and cases cited; Keely v. Sanders, 99 U. S. 441, 447). The Act in question does not authorize the Secretary of Agriculture to promote the sale of stock. It authorizes him "to make advances or loans to individuals in the drought and/or storm or hail stricken areas of the United States for the purpose of assisting in forming local agricultural credit corporations, livestock loan companies, or like organizations, *or of increasing the capital stock of such corporations, companies, or organizations qualified to do business with Federal intermediate credit banks, or to which such privileges may be extended*, and/or of making

loans to individuals upon the security of the capital stock of such corporations, companies, or organizations * *." The defendant filed an application for a loan of this nature, proved himself qualified, and the loan was accordingly made. It is apparent that the Secretary had no interest in seeing that stock in agricultural credit corporations was sold other than to carry out the purpose which Congress indicated to relieve persons in drought, storm or hail stricken areas.

Mr. Burleigh was not in the class of gullible investors. He has been for thirty-six years (R. 192) a practicing lawyer, whose ability and prominence in his State was recognized by the court in its memorandum opinion (R. 71). He had acted as attorney for the Corporation (R. 327). He was a borrower from the Corporation and personally interested in its continuance as a going concern, through which he could renew his obligation from time to time. (R. 174) Under the then existing financial stress, this was of importance. He no doubt had confidence in Mr. Wright, the Vice-President of the Corporation, whom he had known for forty years, and who, he still testifies, sustained a good reputation (R. 176). It is inconceivable that such a man dealing with a company whose manager he had known so intimately and so long could have been in ignorance of the Corporation's financial circumstances as he now pro-

fesses. He knew that some of the assets of all live-stock loan companies were at that time in a non-liquid condition and that a strengthening of the capital structure of many of them was essential to their continued rendering of service to the industry.

With these thoughts in mind, we should like to invite the Court's attention to the testimony of the defendant, which alone contains any attempted support for the assertion that the Secretary of Agriculture was a party to any fraud upon this defendant or that he in any way participated in persuading the defendant to purchase the stock. There was introduced in evidence defendant's Exhibit 11, which consists of a letter dated March 19, 1931, addressed to the defendant by Will T. Wright, Vice-President of the Agricultural & Livestock Credit Corporation. The letter sought to solicit the borrower to purchase 5% cumulative preferred stock in the Corporation and referred to the loan which the Government was authorized by Congress to make through the Secretary of Agriculture for that purpose. The defendant testified that Mr. Wright, the Vice-President of the Corporation, whom he had known for forty years, and who sustained a good reputation (R. 176) approached him personally to subscribe for the stock and that he represented to the defendant that if he obtained a loan for the purpose of purchasing the stock of the Corporation, at the end of two years, if

the Government did not extend the loan beyond that period, the Corporation would pay the note and the defendant "would never have anything to pay either interest or principal" (R. 177, 178). The quoted statement, having been ascribed to a stranger to the transaction, cannot, of course, bind either the Secretary or the United States. The defendant further testified that Wright represented the financial condition of the Company to be sound and the stock to be worth par, and that the Secretary of Agriculture would take the stock as collateral security and loan one hundred cents on the dollar (R. 178). Defendant testified that he did not examine the books of the Corporation or have an opportunity to examine them at a period specifically fixed to have been subsequent to the time that he became a stockholder and borrower and up to the time that he executed the note in suit, a renewal of the original note. He testified that he had since learned within five months preceding the trial of this case that the statements and representations made to him at the time the stock was purchased were untrue (R. 179). He testified that as a result of a reorganization he saw the records pertaining to his affairs with the Corporation (R. 180); that he saw certain reports of examinations of the Corporation, and further testified as follows:

"I learned that the capital of the Corporation was badly impaired, in fact practically wiped out."

It is submitted that this statement can be given no value, as it is merely an unsupported conclusion of the witness, and in any event refers to a condition not contemporaneous, in point of time, with the purchase of the stock. The following is significant with respect to the connection which is sought to be established between the Secretary of Agriculture and the purchaser of the stock:

"Q. Now you charge the government officials with being a party to this transaction, Mr. Burleigh. On what do you base that charge?

A. Well, I base it, in the first place, on the fact that the Secretary of Agriculture devised this plan and prescribed the rules and regulations for carrying it into effect, including these various steps here and the signing of these various papers that I signed." (R. 182.)

It is quite apparent that the Secretary of Agriculture did not devise any plan. He was acting under the authority of Congress, which specifically uthorized him to make a loan of this character and) prescribe rules and regulations for governing the rocedure in connection with such loans. Later the efendant testified that he knew Wright (the Vice-resident of the Loan Company) to be a representa-ve of the Secretary of Agriculture for the sale of ie stock, authorized by him to sell it (R. 190, 191).

He knew, however, that Wright was the Vice-President of the Credit Corporation (R. 191), but continued to assert that the Secretary of Agriculture sent him [Wright] out to sell the stock of the Corporation and that he sent Wright to the defendant to sell him the stock (R. 192). He was asked on cross examination whether he knew of any writing or facts that would support his statement that the Secretary of Agriculture sent Wright to see him for the purpose of getting him to subscribe to the stock. He replied in the affirmative but was unable to show any basis for his previous statement (R. 192). The only explanation the defendant had to offer was as follows:

> "He [the Secretary of Agriculture] sent him [Wright] to see all of his parties that had borrowed money from that corporation to sell them this stock. That was the law passed by Congress giving him that authority, and that was the purpose of it, and he was just carrying into effect the law that Congress had passed and carrying into effect the work that the Secretary of Agriculture's office sent him out to do" (R. 192, 193).

In answer to repeated inquiries as to what law authorized Wright to represent the Secretary in inducing persons to subscribe to the stock of the Corporation of which he was an officer, he referred to Public No. 666, 71st Congress, and insisted that was

the law giving Wright the authority to sell stock (R. 194). He further testified that his principal reason for buying the stock "* * was that the Secretary of Agriculture said to me: 'It is worth a hundred cents on the dollar'" (R. 195). An analysis of his testimony shows, however, that the witness did not contend that the Secretary made such a statement directly or through an agent. The witness was actually testifying to what he regarded as the effect of the circumstances under which the Secretary of Agriculture would lend to a qualified applicant the full purchase price of stock to be bought with the proceeds of a loan (R. 195-196). The record is entirely barren of any evidence to show that the Secretary or any of his representatives made any representations to the defendant of any kind. With respect to the value of the stock at the time of its purchase, attention is called to the fact that on cross examination the defendant testified that he never at any time attempted to discover the financial standing of the Corporation by asking, as a stockholder, to see its books or to examine its records until the year of the trial (R. 328). He admitted that every document that was used and was necessary to dispose of the proceeds of his loan from the Government bore his signature (R. 332). He again asserted that he knew Wright to be the Vice-President and Secretary of the Corporation for whose stock he had subscribed,

but notwithstanding this fact, he also asserted that he knew that Wright was representing the Government (R. 334), but on further cross he gave the basis for his asserted knowledge in the following language:

> "Because he [Wright] told me what the government would do if I would do certain things. I did those certain things and the government then did their part, just what he said they would do" (R. 334).

It is apparent, upon an examination of this testimony, that there is no evidence whatsoever to sustain the assertion which the defendant has made that the Secretary was in any way involved in the sale of the stock. He states and reiterates that he knew that Wright was sent by the Secretary of Agriculture to effect the sale of the stock to him and that Wright was authorized by the Secretary to make the sale, but it is apparent that these are merely unsupported assertions and that there is no single fact in the record to sustain them. We submit, therefore, that there has been a total failure of proof to connect the Secretary of Agriculture, directly or indirectly, with the sale of the stock to the defendant. It must follow that any evidence or attempted evidence to show the worthlessness of the stock; the unsound condition of the Corporation which issued it, or the impairment of the capital of the Corporation,

was inadmissible to support the attempted defense in this suit.

There was also a total failure of proof with regard to the assertion that the stock was worthless. The evidence from which the witness, as well as the court, apparently drew the conclusion that the stock was worth practically nothing consisted of some letters written by the Federal Intermediate Credit Bank commenting on examinations of the books and records of the Agricultural & Livestock Credit Corporation, and upon reports of such examinations. It must be borne in mind that the incompetency of this evidence and its irrelevancy rest upon the fact that it makes no difference what the officers of the Federal Intermediate Credit Bank deemed advisable with respect to book adjustments of assets of the Corporation *for the purpose of conservative accounting from the viewpoint of a rediscounting corporation.*

Due objection was made to the introduction of these papers on the ground that they were incompetent, irrelevant, and immaterial and that they did not tend to prove or disprove any issue in the case (R. 205, 223). However, regardless of the incompetence and the lack of materiality and relevance of this evidence, it not only fails to show that the stock was worthless but as previously indicated (supra, pages 20, 21), it was the opinion of the Fed-

eral Intermediate Credit Bank that the Agricultural Credit Corporation had a substantial net worth within five weeks of the time the stock was purchased.

We have shown by an analysis of the testimony that there is not one scintilla of evidence to connect the Secretary of Agriculture either with the sale of the stock or with any representations made to the defendant with regard to its value. It is clear that what the defendant was attempting to do was to lay a foundation that would estop the United States from collecting on the note because of certain statements purported to have been made by Wright. We have stated, and the statement is supported by a reference to the Act under the authority of which this transaction was consummated, that the Secretary had no authority to do any other act except to make loans to qualified persons for the purposes therein stated and to take the necessary steps to secure those loans. Even though the defendant had introduced evidence to show that Wright, the Vice President of the Agricultural & Livestock Credit Corporation, was acting for the Government in any respect in connection with the transaction, it would not operate to estop the Government. It has been the established law in this country for many years that the unauthorized acts of the agents of the Government cannot estop the Government.

In speaking of the unauthorized acts of certain officers of the United States Army the Supreme Court said in Filor v. United States, 9 Wallace 45, 49:

> "Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States."

To the same effect is the decision of the Supreme Court in the case of Whiteside et al. v. United States, 93 U. S. 247, where it was said (p. 257):

> "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public."

See also Hawkins v. United States, 96 U.S. 689, 691, and Utah Power and Light Co. v. United States, 243 U.S. 389, 409.

THE OPINION BELOW

This opinion makes reference to the purpose of Congress in enacting Public No. 666 and states the defendant testified that the executive officer of the Agricultural & Livestock Credit Corporation "represented and promised defendant and other livestock men who had loans with the company, that payment of neither principal nor interest of the notes given for stock was expected, and that the company would repurchase the stock after two years. In short, that the arrangement, whereby the note and similar notes by other borrowers from the company were given, was a temporary accomodation to tide over the company's credit difficulties; and needless to say, it was represented that the loan company was sound" (R. 71). It is apparent from the record in this case that it would not matter here how many false statements were made by officers of the Credit Corporation to promote the sale of the stock — those statements could not constitute a defense to this suit.

The opinion also contains the statement that the defendant (who was a borrower from the Credit Corporation) had since paid his loan "* * * but it has developed that other loans which the loan company was carrying at the time were not good loans, with the result that the loan company is in liquidation *and that the Government now feels impelled to do*

mand payment of defendant's note in order to meet shortages that have resulted from loans of other borrowers" (R. 72). (Italics added.) It is quite clear that when other borrowers are referred to in the last clause of the quoted comments, the court could not have meant other borrowers from the Government. Obviously, if *shortages* had resulted, they must have resulted to the Credit Corporation, and if they resulted from loans to other borrowers from the Credit Corporation, it is clear that the collection of the defendant's note held by the Government would have no relation to *shortages* of the loan company. Such a collection would clearly be covered into the United States Treasury and could have no bearing upon the condition of the company, except to relieve it from any contingent liability in connection with its endorsement.

The court further made the following statement: "No criticism is here intended of the motives of the Government officials involved. They were merely carrying out the declared policy of Congress at the time. But an act of Congress does not justify the taking of money out of one man's pocket and putting it into the pocket of another, unless the donor gets value". If there can be no criticism of the government officials who were concerned in the making of the loan to the defendant, it is quite clear that there could be no defense to the note in suit based on a lack of consideration.

The court further made the following statement: "The only lawful consideration which can be found for the note Mr. Burleigh was induced to give was the implied assurance that if he gave a new note, he would not be closed out of the cattle business. If a private money lender said to a borrower in distress 'I will close you out unless you will give me an additional note', and gave nothing of value for the new note, could there be any doubt of the invalidity of the additional note?" (R. 72). We should like to point out that there is absolutely no evidence whatsoever from the beginning to the end of the record which justifies the statement which the court has made with respect to the threat to the defendant in the event that the renewal note was not given.

The court further states that the Department of Agriculture "* * * took the greatest pains to see that the proceeds of Burleigh's note went to but one source and for one purpose — to bolster up the loan company's position with the credit company". The record shows that the proceeds of the note were invested in liquid collateral which was deposited with the Federal Intermediate Credit Bank of Spokane to the credit of the Credit Corporation (R. 297-298). So far as the liability of the defendant is concerned, it is entirely immaterial what the Credit Corporation did or authorized to be done with the

money paid for the stock so long as the officers of the Credit Corporation did not dissipate the funds; and if the Credit Corporation acquiesced, as it clearly did, in the investment in liquid securities of the money paid for the stock and the deposit of the securities as collateral with the Federal Intermediate Credit Bank, this defendant was in no position to complain.

Finally, the court suggests that the whole transaction can be undone and all the parties restored to the position which they occupied prior to the time the loan was made. The suggestion is made that the Federal Intermediate Credit Bank convert into cash the land bank bonds which were purchased with the proceeds of the loan and return the cash to the United States Treasury. The court then suggests that the Farm Credit Administration return to the borrower the stock which it holds as collateral to the note; that the borrower then return the stock to the loan company to be cancelled and remarks: "Thus all parties will be returned to their original positions and an obvious injustice corrected. Fortunately, the rights of no innocent purchasers are involved." Taking the first suggestion which the court makes that the Federal Intermediate Credit Bank convert the liquid collateral which it holds into cash and return the cash to the United States Treasury, it is quite apparent that if the Federal Inter-

mediate Credit Bank took such action it would b
guilty of conversion as the collateral belongs to th
Agricultural Credit Corporation. The court does no
indicate what disposition should be made of the note
but we assume it is believed that it should be re
turned to the borrower together with the stock. Th
Corporation is to cancel the stock upon its sur
render.

This suggestion fails to distinguish the relatio
between the Secretary of Agriculture and the bo
rower from the relation between the Agricultura
Credit Corporation and the Intermediate Cred
Bank. The Farm Credit Administration, as su
cessor in interest to the Secretary of Agricultu
(Executive Order dated March 27, 1933, U.S.C. 1
p. 793), has the responsibility of the collection of
note given by the borrower. The proceeds of the no
were invested in stock of the Agricultural Cred
Corporation and that Corporation is indebted to th
Federal Intermediate Credit Bank. There is
legal way whereby the cash in the Intermedia
Credit Bank belonging to the Agricultural Cre
Corporation could be used to liquidate the borro
er's note.

Further, this suggestion fails to recognize th
since the borrower received consideration for h
note and there has been nothing introduced in e
dence to justify the borrower in avoiding payme

he United States has a complete legal right to re-
uire the borrower to repay his note in accordance
ith its terms.

CONCLUSION

In its statements of points and designation of
cord to be printed (R. 414-416) it is submitted that
te assignments of error numbered 5, 6, 7, 8, 9, 10
ad 11 have been shown to be well founded and that
a a consequence, assignment of error numbered 12
aerring error in the conclusions of law must of
ncessity be likewise well founded.

It is accordingly submitted that the judgment
o the court below should be reversed.

Respectfully submitted,

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